United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1135 B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ENID SALTER, a/k/a AARON SALTER,

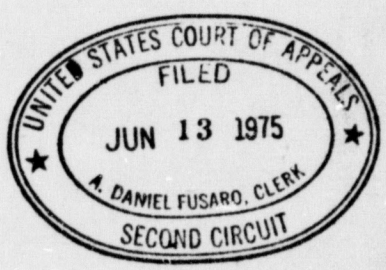
Defendant-Appellant.

APPELLANT'S BRIEF ON APPEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

Docket No. 75-1135

Cr. No. 73-302



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STATEMENT OF CASE

On September 5, 1973, the appellant was indicted by a Grand Jury for the Western District of New York. The indictment consisted of four counts. Counts 1 and 2 charged him with bringing into the United States aliens in violation of Title 8, United States Code, Section 1324 (a) (1); and Counts 3 and 4 wilfully and knowingly encouraging aliens to enter into the United States in violation of Title 8, United States Code, Section 1324 (a) (4). On September 17, 1973, the appellant was arraigned and shortly thereafter John H. Napier, Esq. was assigned as counsel.

The trial was had before Honorable John T. Curtin, United States District Court Judge for the Western District of New York and a jury on January 28, 29, 30 and 31, 1975. The jury was in disagreement on Counts 1 and 2, bringing aliens into the United States. The jury found the appellant guilty of Counts 3 and 4 wilfully and knowingly encouraging aliens to enter the United States. On March 31, 1975, the appellant was sentenced on each count (Counts 3 and 4) for a period of 90 days and fined the sum of $1,000.00. The sentences are to run concurrently.

The notice of appeal was filed on April 4, 1975. Thereafter, John H. Napier, Esq. was continued as assigned counsel by this Court to perfect the appeal.

STATEMENT OF FACTS

TRIP TO TORONTO AND RETURN

Aaron Salter accompanied by his wife, Carol, and his two children, journeyed from Buffalo to Toronto on Sunday, July 29, 1973 (R 259 143a). The purpose of their trip was to visit a married couple (R 259 143a) and go on a picnic (R 259 143a), but unfortunately the couple had a marital dispute prior to the Salter's arrival in Toronto (R 260 144a).

While Carol Salter and the two children remained at the friend's residence, Aaron Salter and his friend drove about the area looking for the friend's wife (R 260 144a). During their search, Aaron Salter met Shirley Paul and Myrtle Hurst (R 261 145a) and drove around Toronto (R 262 146a). Eventually the two women were dropped off and after returning to his friend's house the Salter family returned to Buffalo (R 262 146a). While Salter was in the company of Shirley Paul and Myrtle Hurst, the two women said they were coming that day to the United States (R 263 147a). Salter told Shirley Paul to telephone (R 268 147a) him if they came over that day, and he gave her his telephone number (R 269 148a). Later that day he received a telephone call from Shirley Paul in Buffalo and he drove down and picked both women up near the Peace Bridge and drove them to his home in Buffalo (R 271 148a). Later that day he drove them to the Greyhound Bus Station in Buffalo.

SEARCH AND ARREST AT THE BUS STATION

While the defendant was standing with the two women on the platform of the Greyhound Bus Station in Buffalo, a bus scheduled to make a run to New York City was parked at the platform.

The two women were speaking with a "high English accent"

according to Leo Fernan, the Border Patrol Agent, who testified at both the Suppression Hearing and at trial.

Salter was asked to identify himself and he produced his operator's license. At that point the Border Patrol agent observed a thick wallet and he had Salter count the money and the agent, in turn, counted the money and frisked him (R 33, 165a).

IMPROPER TESTIMONY REGARDING PAYMENT OF MONEY

Shirley Paul was permitted to testify, over objection by counsel, that two days prior to entering the United States, she gave $600 to an unidentified man to give to Aaron Salter (R 177, 136a 178, 137a). At the time of the passage of the money, Shirely Paul had never met Aaron Salter (R 173 132a), and Aaron Salter was not present.

POINT I

The Evidence Adduced Is Legally Insufficient to Sustain the Adjudication; The Cloak of Innocence Has Not Been Dispelled; There Remains a Reasonable Doubt.

The prosecution's key witnesses are the two aliens, Myrtle Hurst and Shirley Paul. Miss Hurst at trial was on the stand two consecutive calendar days. She actually completed her testimony the first day. The second day she was recalled and admitted that she gave false testimony the first day. She admitted lying about a young lady getting out of the automobile in Buffalo after the automobile had passed through immigration inspection (R 105 86a). Indeed, she admitted in her second day on the witness stand that the young lady she had testified about the first day was ficticious (R 106 & 117 87a,96a). Miss Hurst further admitted that she lied about identifying a young lady that occupied the automobile with her from Toronto and that she lied about this matter both the first day of trial and before the grand jury (R 118 97a). And as though that were not enough lying for one day, she admitted lying about events at the Salter home (R 117 96a), and admitted lying at the preliminary hearing (R 120 99a).

At trial, Shirley Paul also decided to change her testimony, but it did not take two trips to the witness stand to accomplish that end. She admitted testifying falsely before the Magistrate at the preliminary hearing (R 187 139a). In her words "I lied at the time" (R 194 142a). She further admitted lying to the Border Patrol officer and deceiving the Immigration authorities (R 193 141a).

Albeit false testimony on material facts should be sufficient to destroy the credibility of Myrtle Hurst and Shirley Paul, there are strong additional reasons for discrediting their testimony. Their testimony is fraught with inconsistency.

To begin with, these witnesses cannot even agree about the color of the vehicles in which they were in at various times during this alleged episode. Hurst alleges she was first picked up in a blue car (P 32 15a); and that an unidentified man, Shirley Paul and Salter were already in this car when she emerged from her apartment (P 33 16a). Before leaving Toronto, they allegedly changed to a big greenish one, which she could not identify by name (P 36 19a). She first stated, however, that this was the same vehicle in which she crossed the bridge and had used to go to the bus station from Salter's home (P 49 22a). Later she changed her testimony and indicated that this was not the vehicle in which she crossed the bridge; that it was only after she had crossed, but before they reached Salter's home, that she again entered Salter's vehicle (P 106, 87a; P 114 93a; P115 94a).

On the other hand, Shirley Paul stated that she observed Hurst arrive at Salter's in a creamed colored vehicle (P 154 118a; P 155/ 119a L 7) and that this vehicle was not as large as the Caddy (P 154 118a P 155/ 119a). It was supposedly a blue Cadillac in which they had left Toronto; had crossed the bridge in (P 147 117a); used to go for a hamburger (P 156 120a) and had gone to the bus station in (P 158 122a P 159 123a). Interestingly enough, at the preliminary hearing, held only about two weeks after the alleged incident, Paul could not remember whether this same Cadillac was a two or a four door vehicle.

It should also be noted that although Hurst is apparently a rather large woman and allegedly got into and out of Salter's vehicle a number of times, she could not remember whether it was a two or four door car just two short weeks later (PH P 58 150a).

Only after these witnesses saw Mrs. Salter at the Court House and learned she was going to testify did they attempt to implicate her. Knowing Mrs. Salter could and would verify the facts as stated

by her husband, Hurst decided to change her testimony. Paul simply attempted to confirm Hurst's new version contradicting in pertinant part the testimony given by her at the preliminary hearing.

Whether or not one believes these witnesses had determined to "protect" Mrs. Salter, Paul's testimony is still incredible. During the preliminary hearing, she emphatically denied being able to identify the person who allegedly called to arrange to have the money picked up and further stated she could not even say it was Mr. Salter's voice (PH P 14 - 149a1). Yet once things began to fall apart for them at trial, Paul attempted to finger Mr. Salter as the one who had called to set the whole thing up (P 166/ 125a) and ended by fabricating a conversation in which Salter allegedly acknowledge receipt of some money (P 169/, 174/ 128a 133a). When initially asked about the conversation which occurred when first she entered the vehicle with Salter and the unidentified man, conspicuously nothing was mentioned about any money (P 137 - 111a, 142 116a).

It is respectfully submitted that the testimony of these two key witnesses is so completely incredible that the conviction can not thereby be sustained.

As these two witnesses admitted testifying falsely as to material facts and further as their testimony is laden with substantial inconsistence, it is respectfully submitted that reasonable doubt as to the defendant's guilt does exist and, therefore, the conviction should be set aside.

POINT II

Testimony From the Border Patrol Agent Regarding Money Possessed by the Defendant Should Have Been Suppressed.

The defendant on July 29, 1973, was standing with two women on the platform at the Greyhound Bus Station in Buffalo. (SH 6 152a) A bus scheduled to make a run to New York City was standing at the platform. (SH 7 153a) The two women were speaking with a "high English accent" according to Leo Fernan, the Border Patrol Agent, who testified at the Suppression Hearing (SH 8 154a). The agent, along with another member of the Border Patrol, approached the three people on the platform and, in response to questioning, each of the three claimed Buffalo as the place of birth. The defendant was asked to enter the baggage room nearby and the two women were directed elsewhere (SH 9 155a). While in the baggage room, the defendant, when asked by Agent Fernan to identify himself, produced his Chauffeur's license (SH 9 155a). Fernan noticed that the wallet contained "a sizeable quantity of money" (SH 9 155a). Fernan then counted the money (about $900) and insisted that the defendant count the money (SH 10 156a). The defendant was also frisked (SH 33 165a). The money was returned at that point to the defendant. About another ten minutes passed without incident, and then the defendant was told he was under arrest.

It is the contention of the defendant that albeit the right of the Border Patrol Agent to ask for identification of the defendant, the agent went far beyond his quest for identification. The defendant, in response to the officer's request for identification, produced an operator's license with his picture on it - far better evidence than most people could produce. It is difficult to understand how the

counting of the defendant's money helped in his identification. Certainly a search had begun when the officer insisted that the money be counted by anyone. When asked by the Court at the Suppression Hearing why the officer asked for the wallet, the officer replied "I wanted to know where he got it (the money)." (SH 21 160a) The officer at the time of his investigation, had no more than a bare suspicion of a violation of immigration laws (SH 6 152a). That suspicion was based upon hearing two women speak with "a high English accent" and talking to a man with a "fat wallet".

In speaking of warrantless searches, Justice Steward in Coolidge v. New Hampshire, 403 U. S. 443, stated:

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption. . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.' In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constituional concepts. In times not altogether unlike our own they won--by legal and constitutional means in England, and by revolution on this continent--a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important."

That a citizen has the protection of the Fourth Amendment of the United States Constitution is made clear in Davis v. Mississippi, 394 U. S. 721 (1969):

> "It is true that at the time of the December 3 detention the police had no intention of charging petitioner with the crime and were far from making him the primary

> focus of their investigation. But to argue that the Fourth Amendment does not apply to the investigatory state is fundamentally to misconceive the purpose of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arests' or 'investigatory detentions.' . . ."

Commenting on the definition of "probable cause" the Court in Brinegar v. U.S. (1949) 338 U. S. 160, quoted with approval an earlier decision:

> "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt."

This same decision went on to comment at page 175:

> "Since Marshall's time, at any rate, it has come to mean more than bare suspicion."

The officer testified at trial concerning his observation of the large sum of Canadian money.

In light of the facts and the law, it is respectfully submitted that any evidence gained by the officer in his search of the defendant should have been suppressed.

POINT III

Testimony by Mrs. Paul Regarding the Passage of Money Should Have Been Excluded.

The receipt of money or other valuable consideration by the defendant is not a necessary ingredient of the crimes charged against the defendant. However, proof of money recieved by the defendant would certainly invite a jury to take a less tolerant view of the defendant, if not to motivate the jury to find against him. This is especially true in a case such as this where the record is loaded with admissions of false testimony and glaring inconsistencies by the prosecution witnesses. Proof of the receipt of money by the defendant in a case such as this can be just that factor which can tip the scales in favor of the prosecution.

The prosecution realizes that its case can be strengthened by injecting money as the motivating factor in the defendant's conduct. Through both Hurst and Paul, efforts were made to spell out payment by them of money to the defendant. One of those efforts resulted in some testimony that was clearly improper and most prejudicial to the defendant. Almost from the outset of Mrs. Paul's testimony an attempt was made to have Mrs. Paul link the defendant Salter with an unidentified man, who visited her in Toronto two days before the trip to America. At the time of that visit by the unidentified man, he was given $600 by Mrs. Paul. The Court finally, after several efforts by the prosecution to establish a link between Salter and the unidentified man, permitted Mrs. Paul to testify that "on the 27th of July, 1973, I gave this man $600 to give to Mr. Salter to take me to . . ." (R 178, 137a). This is hearsay, pure and simple, and indeed most prejudicial to the defendant. The defendant was obviously not present at the time and

Mrs. Paul had never met the defendant before that time.

POINT IV

The Convictions Should Be Reversed And A New Trial Ordered

Respectfully submitted,

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